

COMMISSION

COMMISSION DECISION

of 27 November 1981

relating to a proceeding under Article 85 of the EEC Treaty (IV/30.188 — Moët et Chandon (London) Ltd)

(Only the French text is authentic)

(82/203/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 85 thereof,

Having regard to Council Regulation No 17 of 6 February 1962 ⁽¹⁾, and in particular Articles 3 and 15 thereof,

Having regard to the application submitted to the Commission on 15 September 1980 by Central Wine Buyers (South Leicester) Ltd pursuant to Article 3 of Regulation No 17,

Having regard to the Commission Decision of 13 April 1981 to initiate proceedings in this case,

Having heard the undertakings and persons concerned in accordance with Article 19 of Regulation No 17 and with Regulation No 99/63/EEC ⁽²⁾,

Having regard to the opinion delivered on 14 October 1981 by the Advisory Committee on Restrictive Practices and Dominant Positions in accordance with Article 10 of Regulation No 17,

WHEREAS:

1. The present proceedings concern the terms of sale applied by Moët et Chandon (London) Ltd to buyers of

champagne. The contain a clause which is tantamount to a ban on exports from the United Kingdom.

I. THE FACTS

2. Moët et Chandon (London) Ltd ('MC'), which is established in the United Kingdom, is a wholly-owned subsidiary of the French company Moët-Hennessy. MC is engaged primarily in importing into the United Kingdom and distributing there French-produced champagne wines, champagne ratafia and champagne pomace brandies under the brand names Moët et Chandon, Ruinart and Mercier. These products are hereinafter referred to as 'champagne'.

3. The Moët-Hennessy group has more than 40 subsidiaries established in France and in the major countries of the world. In addition to selling champagne under the aforementioned brand names, its main activities are the production and distribution of cognac (Hennessy) and cosmetics (Christian Dior perfumes, Roc products). Within the Moët et Hennessy group, the French company Champagne Moët et Chandon, of Epernay, also a wholly-owned subsidiary of Moët-Hennessy, is responsible for all the group's operations involving the production and distribution of champagne. All the members of the 'conseil d'administration' (board of directors) of Champagne Moët et Chandon also sit on the corresponding board of Moët-Hennessy. One of them is also on the board of MC.

Moët-Hennessy's aggregate turnover in 1980 was FF 2 923 600 000, with sales of champagne totalling about FF 1 000 000 000. About 80 % of these sales

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

were within the Community. MC's total turnover in 1980 was £ 15 287 000, of which £ ... ⁽¹⁾ represents champagne sales net of tax and duty. The group's sales of champagne within the Community amounted to FF ... in 1980, with excise duties having a minimal effect on these turnover figures.

The United Kingdom is the group's largest export market for champagne, accounting for about 13 % of world sales. The group's share of the United Kingdom market for champagne is about 40 %.

4. From at least 1 January 1980 until 21 October 1981, MC's sales of its brands of champagne have been subject to the terms of sale reproduced below and contained in its price lists ('post-budget price list').

'Terms of sale:

The prices quoted in this list are valid only for goods intended for consumption within the United Kingdom or for sale through diplomatic channels, on airlines or as ships' stores. All orders for goods intended for consumption outside the United Kingdom will be handled and invoiced by our Principals in France.'

This is the sole clause appearing in the price lists in question under the heading 'terms of sale'. The expression 'our Principals' is a reference to Champagne Moët et Chandon, Epernay, France.

Moët-Hennessy informed the Commission in a letter dated 23 October 1981 that these terms of sale had been withdrawn and that a circular letter to this effect had been sent by MC to all its clients on 21 October 1981.

5. These terms of sale are the subject of a complaint lodged with the Commission on 15 September 1980 pursuant to Article 3 of Regulation No 17 by Central Wine Buyers (South Leicester) Ltd ('C.W.B.').

C.W.B. is a wine and spirit wholesaler established in the United Kingdom which, in 1980, bought 3 700 cases of champagne on the aforementioned terms of sale. MC claims that some of the cases bought by C.W.B. were subsequently exported. For this reason, C.W.B. was required in August 1980 to give a formal assurance that 738 cases ordered at that time would be sold only on the domestic market and not exported. C.W.B. was thus prevented from selling elsewhere in the Community MC champagne intended for resale.

6. In 1971, following intervention by the Commission, Champagne Moët et Chandon, France, discontinued a ban on purchasers of its champagne which prevented them from exporting the champagne without its prior approval. It had given as justification for the ban the fact that the individual Member States were normally supplied with different types of champagne to suit different consumer tastes. The Commission had then pointed out by letter dated 30 April 1971 that, bearing in mind its experience, Moët et Chandon could always advise its customers to contact it for information on consumer preferences whenever they wished to satisfy orders from abroad.

Submissions by the parties

7. In reply to the statement of objections addressed to it, Moët-Hennessy has adduced the following arguments: the terms of sale at issue are to be seen in the more general context of the sales policy currently being pursued by its subsidiary Champagne Moët et Chandon, France, which is responsible for the group's champagne business; in view of the tight supply conditions that have been a feature of the champagne market for a number of years and in order to satisfy its customers' requirements as best it can, Champagne Moët et Chandon decided to introduce fixed quotas for supplies to each country; faced with this situation, MC then imposed the terms of sale at issue in order to reserve its limited supplies for the UK market, on which it is responsible for marketing products as smoothly as possible. Moët-Hennessy claims that the terms of sale were designed to prevent speculative buying by powerful UK buyers who might be in a position to engage in large purchases with a view to making exports which would have disrupted the market, run counter to the policy introduced by Champagne Moët et Chandon for coping with the tight supply conditions and for sharing out supplies and forced up prices. However, the representatives of Moët-Hennessy state that it was very difficult for them to assess the scale of such speculative buying. The case in point did not, in their submission, involve a routine attempt at re-establishing market compartmentalization within the common market, but measures to minimize the disruptive effects of the structural shortage on the champagne market.

⁽¹⁾ In the published version of the Decision, some figures have hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

8. Moët-Hennessy also submitted that the terms of sale at issue did not prohibit exports but were designed simply as a means of notifying buyers that the products supplied were, in principle, intended to meet UK demand. According to Moët-Hennessy, the incident which prompted the complaint by C.W.B. is the result of possibly unduly stringent application of the terms of sale by anxious management faced with what it saw as a deflection of the quantities intended for its market and as a setback to the quota arrangements introduced to cope with the shortage.

II. LEGAL ASSESSMENT

Applicability of Article 85 (1) of the EEC Treaty

9. Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

10. The terms of sale laid down in MC's price lists form part of the contracts for the sale of MC champagne concluded at least from 1 January 1980 to 21 October 1981 between MC and buyers wishing to resell. These contracts are agreements between undertakings within the meaning of Article 85 (1).

11. As stated in the terms of sale, the list prices apply only to goods intended for consumption in the United Kingdom, orders for export being handled by Champagne Moët et Chandon in France. This clause is tantamount to a ban on the export of all champagne sold by MC on the said terms. Customers of MC can only take it to mean that goods bought subject to those terms may be resold only for consumption in the United Kingdom; the fact that export orders have to be addressed to the parent company in France does not nullify but rather confirms the existence of the export ban at issue. Indeed, it was compliance with an export ban that MC was seeking to achieve by requiring the complainant to undertake not to sell outside the United Kingdom MC champagne bought on those terms.

12. The object and effect of this clause is to restrict competition within the common market. The clause is intended to prevent, and has prevented, MC's customers in the United Kingdom and persons subsequently buying champagne from them from reselling MC champagne in other Community countries and hence from competing with resellers in those countries. As the parties have explained at length, it is with a view to ensuring that the limited quantities supplied to it remain in the United Kingdom that MC has introduced and imposes the terms of sale in question. The reasons adduced by the parties, viz. the group's sales policy and the measures for sharing out supplies between Member States, serve merely to bring into sharper focus the restrictive object and effect of the export ban at issue which was intended to make them effective. The alleged shortage and the measures taken to deal with it cannot justify so as to exclude the application of Article 85 (1) the fact that UK buyers wishing to resell are deprived of the possibility of reselling in the Community countries of their choice products released on to the UK market by MC.

13. The export ban at issue is, by its very nature, liable to affect trade between Member States since it impedes the movement of MC champagne between the United Kingdom and other Community countries. It engenders an artificial partitioning of the common market and hinders the establishment of a single market among the Member States.

14. In view of the volume of sales of MC champagne in the United Kingdom, the clause in question restricts competition and is likely to have an appreciable effect on trade between Member States (see point 3 above).

Applicability of Article 85 (3) of the EEC Treaty

15. As provided in Articles 4 and 5 of Regulation No 17, an agreement must, in order to qualify for exemption under Article 85 (3), have been notified unless it falls into one of the categories of agreement described in Article 4 (2) and (3). The terms of sale at issue, which are set out in MC's price lists, were not exempt from notification pursuant to Article 4 (2) (1), since they relate to exports between Member States, or pursuant to Article 4 (2) (2), since they do not relate solely to prices or conditions of business or to industrial property rights. This type of agreement is not covered by Article 4 (3).

The terms of sale were not notified in accordance with the provisions of Council Regulation No 17 or Commission Regulation No 27 ⁽¹⁾. They do not therefore qualify for exemption under Article 85 (3). The Commission takes the view that, even if the terms of sale had been notified, they would not have qualified for exemption. The advantages which the parties allege would accrue from the ban in question given the allegedly tight supply conditions (see point 7 above) are not seen to offset the serious drawbacks it has for the free movement of goods and for competition or to require the application of such an import ban.

Applicability of Article 3 (1) of Regulation No 17

16. Under Article 3 (1) of Regulation No 17, the Commission may require that any infringement found be brought to an end.

17. The 'terms of sale' contained in MC's price lists at least from 1 January 1980 to 21 October 1981 constitute an infringement of Article 85 (1) and cannot be exempted.

18. The Commission considers that Moët-Hennessy must be required to refrain from applying, itself or through its subsidiaries, any export ban such as that contained in the terms of sale in question and intended to hinder exports from the United Kingdom to other Member States.

Applicability of Article 15 (2) of Regulation No 17

19. Under Article 15 (2) of Regulation No 17, the Commission may impose fines on undertakings where, intentionally or negligently, they commit an infringement of Article 85 (1) of the Treaty. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

20. In fixing the amount of the fine, the Commission has taken account of the following facts:

- (a) The infringement was committed intentionally. MC, Champagne Moët et Chandon and Moët-Hennessy

must have known that export bans such as the one in question constitute a serious infringement of the competition rules laid down in the EEC Treaty. The Court and the Commission have frequently stated their positions on this type of restriction ⁽²⁾. What is more, the Commission has already had occasion so to inform Champagne Moët et Chandon, France, direct when, following the Commission's intervention, that undertaking terminated in 1971 an export ban it had imposed on buyers of its champagne. Champagne Moët et Chandon, as the parent company, must have been and in fact was aware of the substance of the terms of sale at issue since they made it responsible for handling export orders; it is also clear that in 1971 the Commission, when it pointed out that it was always possible to advise buyers wishing to export (see point 6), did not authorize the imposition of an export ban such as that in question.

- (b) The export ban at issue was introduced on 1 January 1980. It was withdrawn on or about 21 October 1981 (point 4). The infringement appears to have lasted a little less than two years.

- (c) In assessing the gravity of the infringement, the following points must be considered.

- (i) The imposition of an export ban constitutes a serious infringement of the provisions of the Treaty. In this case, the infringement is aggravated because the ban was introduced without being notified, although the Commission's and the Court of Justice's positions on this kind of clause had been clearly established ⁽²⁾.

- (ii) The export ban in question prevented the complainant and other United Kingdom buyers in the same position from selling products intended for other common market countries (points 5 and 7).

- (iii) The clause was introduced with the specific intention of preventing exports from the United Kingdom, so as not to counter the policy of quantitative sharing between Member States set up by Champagne Moët et Chandon (point 7).

⁽¹⁾ OJ No 35, 10. 5. 1962, p. 1118/62.

⁽²⁾ See in particular Judgment of the Court of Justice in Joined Cases 56 and 58/64: Grundig/Consten [1966] ECR 299; Judgment in Case 19/77: Miller International Schallplatten GmbH [1978] ECR 131; Commission Decision of 20 December 1978, OJ No L 50, 22. 2. 1978, p. 16 and Judgment of 10 July 1980 in Case 30/78 (The Distillers Company Ltd) [1980] ECR 2229.

- (iv) MC is part of the Moët-Hennessy group, which is a very important business concern, particularly by virtue of its sales of champagne in the EEC. It also has a very substantial share of the United Kingdom market (see point 3).

21. For the above reasons, the Commission considers it necessary to impose a fine corresponding to the sum indicated in Article 3 of this Decision; Moët-Hennessy, to which this Decision is addressed and which is responsible for the activities of its subsidiaries, will be required to pay that fine within three months of notification of this Decision,

HAS ADOPTED THIS DECISION:

Article 1

The 'terms of sale' contained in the price lists applied by Moët et Chandon (London) Ltd, a subsidiary of Moët-Hennessy, and which form part of the contracts concluded at least from 1 January 1980 to 21 October 1981 by Moët et Chandon (London) Ltd with buyers of its champagne constitute an infringement of Article 85 (1) of the Treaty establishing the European Economic Community.

Article 2

Moët-Hennessy shall refrain from applying, itself or through its subsidiaries, an export ban such as that contained in the said terms of sale and intended to hinder exports from the United Kingdom to other Member States.

Article 3

A fine of 1 100 000 (one million, one hundred thousand) ECU, or £ 624 977.10 (six hundred and twenty-four thousand, nine hundred and seventy-seven pounds sterling and ten pence) or FF 6 801 872 (six million, eight hundred and one thousand, eight hundred and seventy-two French francs) is hereby imposed on Moët-Hennessy. The fine shall be payable to account No 108.63.41 at Lloyds Bank, London, or to account No 5.770.006.5 at La Société Générale, Paris, within three months of the date of notification of this Decision.

Article 4

This Decision is enforceable in the manner provided for in Article 192 of the Treaty establishing the European Economic Community.

Article 5

This Decision is addressed to Moët-Hennessy SA, 30 Avenue Hoche, 75008 Paris, France, in respect of itself and of its subsidiaries.

Done at Brussels, 27 November 1981.

For the Commission

Frans ANDRIESEN

Member of the Commission